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No. 82-499

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN D. COLE, III,
PETITIONER,

v.

WESTINGHOUSE BROADCASTING COMPANY, INC., SEYMOUR YANOFF and AMY KONOWITZ,
RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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Standard Press, Inc., Boston, Mass.—Law Printers

Questions Presented[1]

1. Whether special and important reasons exist why this Court should consider the issues sought to be raised by the petition?

2. Whether the state court's decision that respondents' right to appellate review in the state court of a given issue had been preserved under Massachusetts Rules of Civil Procedure is or is not the decision of a federal question reviewable by this Court under 28 U.S.C. § 1257(3)?

3. Whether the state court's decision that allegedly defamatory statements, attributable to respondents, concerning the reasons for the discharge of petitioner, a television news reporter (that petitioner was discharged because of "sloppy and irresponsible reporting" and "a history of bad reporting techniques") were statements of opinion (and therefore not actionable), rather than statements of fact, is a decision reviewable by this Court under 28 U.S.C. § 1257(3), since the decision rested upon adequate and independent state grounds?

4. Whether in the absence of decision by the state court of an issue raised by petitioner in the state court (that his discharge was a "private matter" to which the rule of *New York Times Co.* v. *Sullivan* does not apply) is an issue reviewable by this Court under 28 U.S.C. § 1257(3)?

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[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court, respondent, Westinghouse Broadcasting Company, Inc., whose corporate name was changed on May 1, 1982, to Westinghouse Broadcasting and Cable, Inc., hereby lists all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates. They are as follows:

Westinghouse Electric Corporation (parent company) and CATV Enterprises, Inc. (a subsidiary in which respondent owns a 49% interest). This listing does not include non-wholly owned subsidiaries of the respondent's parent corporation, Westinghouse Electric Corporation, as it is respondent's understanding that such further listing is not required by Rule 28.1.

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RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Respondents, Westinghouse Broadcasting Company, Inc. ("Westinghouse"), Seymour Yanoff ("Yanoff"), and Amy Konowitz ("Konowitz"), hereby oppose the subject petition of John D. Cole for a Writ of Certiorari to review the judgment of the Supreme Judicial Court of Massachusetts (the "state court").

Opinion Below

The opinion of the state court (the "decision") is reported at 386 Mass. 303 (1982) and at 435 N.E.2d 1021 (Mass. 1982). A copy of the decision is set forth in Appendix A.

Summary of Argument

The petitioner, John D. Cole ("Cole") has failed to satisfy the jurisdictional requirements of 28 U.S.C. § 1257(3) in that the judgment of the state court rests upon adequate and independent procedural or substantive state grounds. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). Moreover, Cole has failed to demonstrate special and important reasons for this Court to exercise its jurisdiction, even assuming jurisdiction exists. Cole presents issues for review that are purely episodic in that they are confined to the parties and the facts presented. Furthermore, the result reached by the state court was not grounded solely upon an adjudication of federal rights. The state court ruled that Cole had failed to establish a *prima facie* case of defamation as a matter of law as the alleged defamatory statements were found to be non-actionable personal opinions. Thus, this case is not an appropriate one for review by this Court because, while the state court considered constitutional principles, the judgment is supported by non-constitutional grounds.

Statement of Case

The only relevant facts material to the questions presented are as follows as derived from the state court opinion (Appendix A):

This defamation action concerns statements made regarding the dismissal of Cole, a well-known (in Boston) television news personality, as evidenced by the fact that the jury found him to be a public figure. (Appendix A at 2a). In March, 1975, WBZ-TV ("WBZ")[2] dismissed Cole statedly for reasons of mis-

[2] WBZ is a broadcasting entity owned and operated by respondent Westinghouse; Yanoff is the general manager of WBZ; and, Konowitz was the official spokesperson for WBZ. (Appendix A at 2a).

conduct and insubordination. (Appendix A at 3a). In responding to media inquiries regarding Cole's termination, a WBZ representative stated that the "unofficial" reasons for Cole's termination were his "sloppy and irresponsible reporting" and "a history of bad reporting techniques." (Appendix A at 3a, 4a). In April, 1975, Cole commenced this action against respondents, claiming that the statements by WBZ were defamatory. (Appendix A at 2a, 4a).

At the trial of Cole's action, the jury returned a verdict in Cole's favor, assessing damages of $100,000, against Westinghouse and Yanoff. (Appendix A at 2a). Respondents Westinghouse and Yanoff appealed from the judgment and the denial of their respective motions for judgment notwithstanding the verdict or for a new trial. *Id.* Cole filed a cross-appeal. *Id.* The state court reversed the judgment for Cole and ordered judgment for respondents. (Appendix A at 2a, 11a). The state court held that the alleged defamatory statements were opinions not subsuming defamatory facts and, therefore, did not constitute actionable defamation. (Appendix A at 11a). The state court did not reach issues presented concerning the nature of malice and public figures. *Id.*

Argument

I. There Are No Special And Important Reasons Why This Court Should Consider The Issues Sought To Be Raised By The Petition.

A decision of any of the issues sought to be raised by the petition would rest solely upon the facts of this case and would have no decisional effect other than upon the parties to this proceeding. Cole has failed to demonstrate any special and important reasons why this court should consider the issues presented for review.

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.... "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341.

Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

II. The State Court's Decision That A Given Issue Was Open On The Record Before It Under The Massachusetts Rules Of Civil Procedure Raises No Issue For This Court.

Cole's argument that the state court misconstrued the decisions of this Court as requiring it to depart from state procedural rules is entirely without merit. On appeal to the state court, Cole argued that the issue of whether the alleged defamatory statements were fact or opinion was not properly preserved for review. (Appendix A at 5a). Specifically, Cole contended that the issue was not before the state court "because the defendants' motions for directed verdicts did not explicitly rely on the ground that the phrases were nonactionable opinions, but instead asserted that there was no evidence to warrant a jury finding of actual malice on the part of the defendants." *Id.*

The state court ruled, however, that the issue was properly before them "for *several* reasons." *Id.* (emphasis added). In particular, the court stated three reasons why the specificity of defendants' motions for directed verdicts was sufficient:

> [1] The judge had adequate notice of [the] issue which was fully presented at the pre-trial stage and again at the post-trial stage. [2] In addition, the issue whether sufficient evidence of a defendant's required state of mind exists is closely connected to the issue whether the statement can be characterized as an opinion or a fact. [3] Finally, in a case of this type where constitutional issues are presented [the Supreme Judicial Court's] role as a reviewing court is necessarily broad. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964).

(Appendix A at 5a, 6a). Certainly, the state court may decide, as a matter of state law, that it will construe its state procedural rules in a manner that does not foreclose review of issues on purely technical grounds. The mere reference to *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), by the state court with respect to the third reason, that constitutional issues were presented, does not establish that the state court rested its decision on constitutional grounds. *See Lynch* v. *New York*, 293 U.S. 52, 54 (1934); *Osborne* v. *Clark*, 204 U.S. 565, 567-68 (1907). Indeed, it is apparent from the context of such reference that the state court cited *New York Times Co.* v. *Sullivan* merely as a persuasive authority in determining independently its role as a reviewing court. Nevertheless, the state court's use of this Court's decisions as collateral authority does not create a ground for this Court to invoke its jurisdiction. *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556 (1940).

Even assuming that the state court's third and final reason for rejecting Cole's procedural argument rested in part on constitutional grounds, however, there were two independent and adequate state law grounds for its decision. It is a settled rule

that "this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 129 (1945). Here, the state court specificially noted two additional grounds for its holding, neither of which related to the fact that constitutional issues were presented for review.

As this Court recognized in *John* v. *Paullin*, 231 U.S. 583, 585 (1913):

> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.

See also Wolfe v. *North Carolina*, 364 U.S. 177, 195 (1960). Indeed, Cole recognizes that "[i]t is well settled that, in the absence of evasion, state procedures govern the raising and preservation of even constitutional issues." (Cole Petition at 13).[3] No question concerning the evasion of federal questions is presented or argued here. This Court should reject, therefore, Cole's ill-founded attempt to transform the decision resting on state procedural grounds into a matter worthy for review by this Court.

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[3] It is clear from the fact that the Petition sets forth an extended argument on the merits of this issue that Cole is asking this Court to depart from its established practice of declining to review a state court's construction of its own procedural rules. *See* Cole Petition at 10-12, 14-15.

III. The State Court's Decision That Allegedly Defamatory Statements Were Statements Of Non-Actionable Opinion Rather Than Statements Of Fact, Rests Upon Adequate And Independent State Tort Law And Is Therefore Not Subject To Review.

The state law dispositive ground underlying the state court decision is that the alleged defamatory phrases constituted the expression of a non-actionable opinion and could not reasonably be viewed as statements of fact when viewed in the context in which the statements were made. (Appendix A at 11a). After examining that context, the state court found that statements that Cole was guilty of "sloppy and irresponsible reporting" and had a "history of bad reporting techniques" were an expression of opinion as to Cole's reporting abilities in that the meaning of the statements was "imprecise and open to speculation" and could not be proven false. (Appendix A at 8a, 10a). Accordingly, it is clear that the ruling that the statements did not constitute a defamatory opinion rested upon wholly independent state law grounds.[4]

Despite the clear disposition of this matter on state law grounds, Cole seeks to characterize the decision as involving the application of the First and Fourteenth Amendments by claiming that the distinction drawn by the state court between assertions of fact and expressions of opinion (the "fact/opinion distinction") has constitutional significance. Such a claim by

[4] The Supreme Court has denied certiorari in the following defamation cases, which appear to involve the issue of whether a statement was one of fact or opinion and hence non-actionable: *See, e.g., National Association of Government Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980); *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977); *Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977); *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Good Government Group of Seal Beach, Inc.* v. *Superior Court*, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572 (1978), *cert. denied*, 441 U.S. 961 (1979).

Cole is clearly incorrect. Section 566 of the *Restatement (Second) of Torts* (1977), as adopted and applied by the state court, distinguishes between a false assertion of fact and a derogatory opinion in that the latter "is actionable only if it implies the allegation of undisclosed *defamatory* facts as the basis for the opinion." (Appendix A at 10a, 11a) (emphasis added).

The conclusion by the state court that the statements in question constituted non-actionable opinion (which Cole had failed to establish below were based upon undisclosed defamatory facts) rests upon established principles of state tort law. The state court applied the state standard of review established by it in *Myers* v. *Boston Magazine Co.*, Mass. Adv. Sh. (1980) 907, 403 N.E.2d 376 (1980), with respect to the evaluation of challenged statements as actionable assertions or non-actionable opinion. That standard is as follows:

> [T]he test to be applied in determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.

Mass. Adv. Sh. (1980) at 913, 403 N.E.2d at 379 (quoting from *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980)).

Cole cannot transform his failure to meet his burden of proof at the trial level into a matter meriting review by this Court in view of the state court's clear dispositive application of state

law. In short, the application by the state court of the fact/opinion rule does not raise a jurisdictionally substantial federal question, indeed any federal question whatsoever.

IV. The State Court Did Not Decide Whether A "Private Matter" Limitation Exists With Respect To The Doctrine Of *New York Times* v. *Sullivan*, Nor Was The Decision Of Such Issue Necessary To, Or Implicit In, The State Court Decision.

Cole contends that the state court "implicitly" rejected his contention on cross-appeal that constitutional standards do not apply to cases of private defamation. (Cole Petition at 8). The state court, however, did not consider this issue because there was not any reason to do so. In its decision, the state court concluded "[w]e need not respond to the arguments concerning the nature of malice and public figures because we hold that the statements under review are opinions and that as opinions they do not subsume defamatory facts and hence, they do not constitute actionable defamation." (Appendix A at 11a).

Consequently, because it is readily apparent that the state court did not decide the issue of whether constitutional standards apply to private defamation, this Court lacks the requisite jurisdiction under 28 U.S.C. § 1257 to consider this issue. As Chief Justice Hughes observed in *Lynch* v. *New York*, 293 U.S. at 54:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

See also Honeyman v. *Hanan*, 300 U.S. 14, 18 (1937). Thus, a petitioner must show not only that a federal question was presented to the highest state court, but also that the state court expressly or necessarily decided the federal question.[5] Cole cannot satisfy that requirement.

The state court expressly stated, in light of its holding that the subject words were non-actionable, it was unnecessary to decide the argued federal questions concerning the respondents' state of mind or standard of care. Even if the state court's decision could be construed as ambiguous in this regard (which respondents suggest is not the case), in determining its jurisdiction on certiorari this Court should choose that interpretation of the opinion that does not present a constitutional question. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 299 (1956). Granting review of the issue — whether constitutional standards apply to cases of private defamation — would be inconsistent "with the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case." *Minnesota* v. *National Tea Co.*, 309 U.S. at 555.

Finally, it is the Court's "duty to decline jurisdiction whenever it appears that the constitutional question presented is not, . . . substantial in character." *Zucht* v. *King*, 260 U.S. 174, 176 (1922). *See also Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1952). Cole states that the question presented on his cross-appeal was the "applicability of the constitutional standards initially enunciated in *New York Times Co.* v. *Sullivan* to a case of a private plaintiff (i.e., a public figure but in relation to a private matter) and a non-media defendant." (Cole Petition at 10). Nevertheless, Cole's argument based on this presumed "private

[5] Indeed, Sup. Ct. R. 17.1(b) presupposes that the state court of last resort has "decided" the federal question presented for review.

matter" distinction in regard to his public figure status is wholly untenable. Cole was a public figure for all purposes of this case.[6] *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345, 352 (1974).

Conclusion

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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[6] Cole has never challenged the jury finding that he was a public figure.

APPENDIX A

JOHN D. COLE, III vs. WESTINGHOUSE BROADCASTING COMPANY, INC. & another.[1]

Suffolk. February 1, 1982. — May 20, 1982.

Present: HENNESSEY, C.J., LIACOS, NOLAN, & O'CONNOR, JJ.

Libel and Slander. Practice, Civil, Appeal.

CIVIL ACTION commenced in the Superior Court on April 2, 1975.

The case was tried before *Good,* J.

The Supreme Judicial Court granted a request for direct appellate review.

Charles R. Parrott (Mary Lee Jacobs with him) for the defendants.

Alexander H. Pratt, Jr., & Harvey Weiner for the plaintiff.

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[1] Seymour Yanoff.

NOLAN, J. The plaintiff, John D. Cole, III (Cole), brought this action in the Superior Court for alleged defamation by Westinghouse Broadcasting Company, Inc. (Westinghouse), WBZ-TV, Seymour Yanoff, individually and as general manager of WBZ-TV, Amy Konowitz, individually and as official spokesperson for WBZ-TV and Alan Frank, individually and as program manager of WBZ-TV. At the close of the plaintiff's case, the trial judge allowed motions by Frank and Konowitz for directed verdicts, but denied similar motions by Westinghouse and Yanoff.[2] Westinghouse and Yanoff renewed their motions for directed verdicts at the conclusion of the trial and those motions were denied. In response to a special question, the jury found Cole to be a public figure. They returned a verdict in Cole's favor and assessed damages of $100,000. Westinghouse and Yanoff appealed from the judgment on the jury verdict and the denial of their motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. Cole cross-appealed from the judgment entered in favor of Konowitz. We allowed the defendants' application for direct appellate review. We reverse the judgment for Cole.

The evidence may be summarized as follows. Cole began his employment with WBZ-TV in 1969 as a staff reporter. From July, 1971, to July, 1974, he was employed under a written contract as a staff news announcer. Following the expiration of Cole's employment contract in July, 1974, he continued employment with WBZ-TV as a general assignment reporter covered by a collective bargaining agreement. Yanoff became the general manager of WBZ-TV in August, 1973. One William Alber was hired as WBZ-TV news director in October, 1974.

During the winter of 1974-1975, WBZ-TV broadcast a series of reports which Cole had prepared concerning the political fundraising of the mayor of Boston, Kevin White, and his use of the Parkman House. On March 13, 1975,

[2] As to the defendant WBZ-TV see discussion *infra*.

Cole covered a meeting of the Boston Finance Commission (commission) at which the commission voted to investigate Mayor White's fundraising activities. Cole's report was broadcast on the evening news. Aber observed Cole's report and also viewed a broadcast by another local television station which aired a film of Mayor White commenting on the vote of the commission. Cole's report did not include the Mayor's comment although Cole had been told by a WBZ-TV news director that the film was available for use. Yanoff testified at trial that Aber met with him on March 13, 1975, and informed him of the events of the day. The following day Yanoff reviewed written statements prepared by Aber and three members of the news staff concerning the broadcast. Aber recommended Cole's termination on the grounds of "misconduct and incompetence" and detailed the incident concerning the omission of Mayor White's comments which led to this recommendation. Cole was suspended and terminated about one week later.

Yanoff prepared an official statement to be released when the television station received inquiries relating to Cole's termination. The release stated that Cole had been terminated "for reasons of misconduct and insubordination." Yanoff testifed at trial that he gave the statement to one Alex Dusek and directed Dusek to give it to Amy Konowitz to use in responding to inquiries from the media.

On March 21, 1975, an article appeared in the Boston Globe newspaper, by Percy Shain, stating that Cole had been fired for "misconduct and insubordination." The article mentioned the incident involving the commission and went on to say that a WBZ-TV spokesman said "unofficially, the Cole's firing was not a direct result of the newscast, but was a case of 'sloppy and irresponsible' reporting." Shain testifed at trial that, prior to writing the article, he had called Konowitz and inquired about Cole's suspension. Konowitz read him the official release. Shain then asked her for more information and she said "unofficially" that it was a case of "sloppy and irresponsible reporting." This

is one of the statements which Cole claims to be defamatory.

About the same time, David O'Brian, a columnist for the Boston Phoenix newspaper, telephoned WBZ-TV, and spoke with Konowitz. He testified that he asked her why Cole had been terminated and she read to him the WBZ-TV's official statement. He then stated to her that he had heard that Cole had been fired because of the way he had handled the report on the Boston Finance Commission's press conference. Konowitz replied: "That was just the last straw. Jack was fired for a history of bad reporting techniques." O'Brian wrote a column published in the Boston Phoenix newspaper quoting this statement. Cole alleged that this statement was defamatory.

1. *Prematurity of appeal.* Before reaching the merits of this appeal, we shall discuss two preliminary issues raised by the plaintiff. The plaintiff argues that this appeal should be dismissed because of the defendants' failure properly to file notices of appeal. The plaintiff filed a complaint against Westinghouse, WBZ-TV, Yanoff, Konowitz, and Frank. The judge allowed motions for directed verdicts as to Konowitz and Frank. On October 31, 1980, the jury returned a verdict for the plaintiff, on which judgment was entered on November 3, 1980. Westinghouse and Yanoff timely moved for judgments notwithstanding the verdict or, in the alternative, for a new trial. The judge denied the motions on December 23, 1980. On January 21, 1981, Yanoff and Westinghouse filed notices of appeal from the judgment on the jury verdict and the denial of their motions. The plaintiff filed a cross-appeal on January 30, 1981, from the judgment entered in favor of Konowitz. On March 3, 1981, the parties filed a stipulation of dismissal as to WBZ-TV. The plaintiff argued that since judgment was not entered for WBZ-TV until March 6, 1981, the case was not ripe for appeal until that time and the defendants' appeals filed on January 21, 1981, were premature and ineffective.

WBZ-TV is owned and operated by Westinghouse. Although WBZ-TV was designated a separate entity in the

complaint, it is clear that the parties treated WBZ-TV and Westinghouse as one and the same throughout the litigation. Cole did not ask for a judgment against WBZ-TV and filed his notice of cross-appeal from the same judgment from which the defendants appealed in January, 1981. The plaintiff has not been prejudiced by the prematurity, if any, of the notice of appeal and we will not avoid a decision on the merits on the basis of such a technicality. *Hutchinson* v. *Hutchinson*, 6 Mass. App. Ct. 705, 707 (1978), and cases cited.

2. *Specificity of motions for directed verdicts.* The plaintiff next contends that the issue whether the statements alleged to be defamatory constitute fact or opinion has not been properly preserved for review. The plaintiff argues that the issue is not before us because the defendants' motions for directed verdicts did not explicitly rely on the ground that the phrases were nonactionable opinions, but instead asserted that there was no evidence to warrant a jury finding of actual malice on the part of the defendants. We find that the issue is properly before us for several reasons. The defendants, in their oral argument on their motion to dismiss at the outset of the trial, argued at length that the action should be dismissed because the statements were nonactionable opinions. The judge declined to rule on the motion, stating essentially that he wanted to hear evidence concerning the circumstances in which the statements were made before determining their nature. At the directed verdict stage, while the defendants did not expressly raise this issue, they based their motions for a directed verdict on the lack of evidence which would warrant a finding of actual malice on the part of the defendants. Finally, in their motions for judgment notwithstanding the verdict the defendants expressly raised the opinion versus fact issue. While the defendants perhaps should have explicitly included the opinion versus fact distinction in their motions for directed verdicts, their failure to do so does not bar our review of that issue now. The judge had adequate notice of this issue which was fully presented at the pretrial stage

and again at the post-trial stage. In addition, the issue whether sufficient evidence of a defendant's required state of mind exists is closely connected to the issue whether the statement can be characterized as an opinion or a fact. Finally, in a case of this type where constitutional issues are presented, our role as a reviewing court is necessarily broad. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964). We now discuss the merits.

Because the plaintiff is a public figure, this libel action is governed by the constitutional principles first set forth in *New York Times Co.* v. *Sullivan, supra*. Our role in reviewing a libel case of this kind requires careful appellate review of the facts. We must "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect . . . We mustn't 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression" (citations omitted). *Id.* at 285. After undertaking such a review in this case we conclude that the jury verdict for the plaintiff must be set aside. The alleged defamatory statements are nonactionable opinions.

3. *The statements as opinions.* Recently, in *National Ass'n of Gov't Employees, Inc.* v. *Central Broadcasting Corp.*, Mass. Adv. Sh. (1979) 2485, cert. denied, 446 U.S. 935 (1980), and again in *Myers* v. *Boston Magazine Co.*, Mass. Adv. Sh. (1980) 907, we discussed the law governing defamatory opinions. We started with the premise that "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974). The determination whether the allegedly defamatory statements constitute fact or opinion is critical. "In this context courts apply the Constitution by carefully distinguishing between

statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse." *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976). The determination whether a statement is one of fact or opinion is generally considered a question of law. In *Greenbelt Coop. Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 13-14 (1970), the Supreme Court set aside a jury verdict and held that the use of the word "blackmail" to describe the conduct of the plaintiff in that case could not have been understood as a statement of fact and therefore was not libelous as a matter of law. Similarly, in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 283 (1974), the Court held that the publication of Jack London's definition of "scab," containing words suggesting that the plaintiffs had "rotten principles," and were "lacking character," did not constitute libel. "Such words were obviously used...in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law." *Id.* at 284. In *Myers* v. *Boston Magazine, Inc.*, *supra* at 912, we applied these principles and held as a matter of law that the statement at issue there was an opinion and could not be the basis of a libel action.

In deciding whether statements can be understood reasonably as fact or opinion "the test to be applied...requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published." *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). See *New York Times Co.* v. *Sullivan*, 376 U.S. 254,

285 (1964); *Buckley* v. *Littell*, 539 F.2d 882, 888 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977). We applied this test in *Myers*, *supra*, and now apply it here.

The two columnists, Percy Shain and David O'Brian, telephoned Konowitz, in her capacity as a spokesperson for WBZ-TV, seeking information concerning Cole's dismissal. Konowitz read them both the official release which stated in part that Cole was dismissed because of "misconduct and insubordination." Cole did not contend in his complaint that this statement was defamatory. It was only upon further questioning that Konowitz stated "unofficially" that Cole's dismissal was due to "sloppy and irresponsible reporting" and a "history of bad reporting techniques." It is important to our analysis that Cole was a public figure at the time of this incident and that the circumstances surrounding his dismissal were a matter of public interest, as evidenced by the newspaper articles published concerning his dismissal. The official statement prepared by WBZ-TV stated that Cole was contesting his dismissal. Cole testified that he spoke with a member of the press at that time and expressed his view that political pressures played a role in his dismissal. While the situation was probably not the type of heated "public debate" in which "voices could be expected to be raised in sloganeering invective," *National Ass'n of Gov't Employees* v. *Central Broadcasting Corp.*, Mass. Adv. Sh. (1979) 2485, 2493, the context of the statements is a significant factor in our determination of how they could reasonably be understood. As the California court wrote in *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976), "what constitutes s statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion."

Here, the fact that the statements were made in response to inquiries concerning the contested dismissal of a public figure is of some significance in how they could be reasonably interpreted. The audience which received the statements, first the reporters and later those reading the newspaper articles, were aware that Cole and WBZ-TV claimed different reasons for Cole's contested dismissal. The newspaper articles included this information. Both reporters acknowledged that Konowitz had made the statements at issue only in response to their further questioning and after qualifying her remarks as "unofficial." The reporters testified that they understood that her statements were not part of the television station's release. These factors lend support to our view that the statements were matters of opinion rather than fact.

A review of recent cases in which the opinion versus fact distinction was applied strengthens our view that the phrases "sloppy and irresponsible reporting" and "history of bad reporting techniques," when viewed in their context, could not reasonably be viewed as statements of fact. The case of *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 376, cert. denied, 434 U.S. 969 (1977), involved assertions published by the defendant which stated that a certain judge was among the ten worst judges in New York, had made a "sufficient pattern of incompetent decisions" and should be removed from judicial office. The court held these statements to be nonactionable expressions of opinion, stating that the "[p]laintiff may not recover from defendants for simply expressing their opinion of his judicial performance, no matter how unreasonable, extreme or erroneous these opinions might be." *Id.* at 380-381. The court distinguished the statement that the plaintiff was "probably corrupt" as this was an accusation of criminal activity that could be proved true or false. *Id.* at 381-382. *Edwards* v. *National Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir.), cert. denied sub nom. *Edwards* v. *New York Times Co.*, 434 U.S. 1002 (1977), was an action sounding in defamation brought by certain scientists based on publication of an

article accusing them of being "paid liars" in regard to their support of the continued use of the insecticide DDT. The court distinguished between the phrase "paid liars" and "liars," stating that the first would be actionable as it implies corruption and can be proved true or false whereas the word "liar" merely expressed an opinion and could not be libelous, however mistaken the opinion might be. In *Buckley* v. *Littell*, 539 F.2d 882, 884-885 & n.1 (1976), the court held that the phrases published in a book concerning extremism which stated that the plaintiff was a "fascist," "fellow traveler" of fascism and printed " 'news items' and interpretations picked up from the openly fascist journals" were matters of opinion and protected ideas, while the assertion that the plaintiff had lied about and libeled several people in his work as a journalist was an assertion of fact.

In *Myers*, *supra*, we held that the statement that Myers, a local television sports announcer, "is enrolled in a course for remedial speaking" could only be interpreted as an expression of opinion, or critical judgment and was, therefore, nonactionable. We reached this decision after examining the context in which the statement was made noting that "[r]emoved from context, the statement passes for a factual proposition whose sense is clear." *Id.* at 915.

Similarly, the statements made by Konowitz can only be viewed as expressions of opinion regarding Cole's reporting abilities. Whether a reporter is sloppy and irresponsible with bad techniques is a matter of opinion. The meaning of these statements is imprecise and open to speculation. They cannot be characterized as assertions of fact. They cannot be proved false. "An assertion that cannot be proved false cannot be held libellous." *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), cert. denied sub nom. *Hotchner* v. *Doubleday & Co.*, 434 U.S. 834 (1977).

The plaintiff argues that even if the statements are viewed as opinions they are actionable because they imply the allegation of undisclosed defamatory facts as the basis for the opinion. Section 566 of Restatement (Second) of Torts (1977) states: "Expressions of Opinion. A defamatory

communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Comment *c* of § 566, at 173 states: "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.... It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct...." When the statements are viewed within their context, they do not imply the allegation of undisclosed defamatory facts as their basis. It was disclosed by the press release that Cole was terminated for "misconduct and insubordination." This was the stated reason for his dismissal. There was also discussion of Cole's conduct in reporting the Boston Finance Commission hearing. These are the "facts" underlying the opinion. While Konowitz's statements may also imply that she had knowledge of other instances of Cole's alleged shortcomings as a reporter, this possibility does not meet the requirements of § 566. Even assuming that the statements imply other undisclosed facts, in order for an opinion to be actionable, the undisclosed facts must be defamatory.

In the present case, it is not clear that any undisclosed facts are implied, or if any are implied, it is unclear what they are. Finally, it is entirely unclear (even assuming that facts are implied) that they are defamatory facts. We therefore find no merit in the plaintiff's argument that the opinion is actionable on the basis of underlying assumed defamatory facts.

4. *Conclusion.* We need not respond to the arguments concerning the nature of malice and public figures because we hold that the statements under review are opinions and that as opinions they do not subsume defamatory facts and hence, they do not constitute actionable defamation.

Judgment reversed.

Judgment for the defendants.